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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JERRY LESTER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The question presented is whether the Court of Appeals was correct in holding that all payments to taxpayer's wife were alimony where the agreement provided that all payments ceased upon the wife's remarriage regardless of the ages of the children, and where there was no allocation of any amount or portion of the payments which must be used for the support of the children.

Statement

Jerry Lester and his former wife entered into a Separation Agreement on April 16, 1951. This agreement intended and provided that the wife was to pay the income tax on all monies received by her (R. 5a).[1] They were subse-

[1] Record references are to the Appendix to taxpayer's brief in the Court of Appeals.

quently divorced, and the Separation Agreement was made part of the decree, and included therein. The Separation Agreement provides for payments to the wife of stated percentages of the husband's income (R. 4a-5a). The agreement further provides that all payments to the wife are to cease upon her remarriage, regardless of the ages of the children (R. 5a). The agreement also provided that payments to the wife would be reduced by one sixth in the event any of the children married, became emancipated, or died. Despite this percentage reduction, the maximum payments which the wife could receive were not reduced and remained constant. The agreement did not provide that any or portion of the payments to the wife was required to be used for the support of the children.

Summary of Argument

The Writ should not be granted because the decision below is not in direct conflict with the decision of another Court of Appeals; it turns on the interpretation of a particular agreement; and it presents no problem of continuing importance in the administration of the tax laws.

Argument

1. There is no real conflict in decisions between the Circuits. Each of these cases must be decided on its own facts. In no case cited in the Petition do all of the payments cease upon the remarriage of the wife, regardless of the ages of the children, as they do in the instant case, nor are the facts similar to the instant case. The same may be said of the cases which the petition claims are awaiting decision.

As a matter of fact, in opposing Petitions for Certiorari by taxpayers, the Petitioner here has taken pains to show this Court that no such conflict exists. For example, in

opposing Certiorari in *Weil* v. *Commissioner*, 240 F. 2d 584, Cert. den. 353 U. S. 958 the government there said on page 10 of its brief:

> "Whether an agreement incident to a divorce fixes a portion of the amounts payable by the husband to the wife as payable for the support of minor children within the purview of Section 22(k), necessarily depends upon the particular terms of the agreement read as a whole. Both courts below were in agreement on this score, but differed as to the construction to be placed upon the agreement as a whole, each emphasizing different provisions. While we believe that the Tax Court's interpretation is a reasonable one, and so contended in the Court below, it cannot be said that the interpretation adopted by the Court of Appeals is not also a permissible one. Certainly the issue presented, turning as it does upon *the construction of the terms of a particular agreement is not of sufficient importance to warrant further review by this Court.*" (emphasis added)

The same may be said here, and this petition should be denied.

Again, in opposing Certiorari in *Eisinger* v. *Commissioner*, 250 F. 2d 303, Cert. den. 356 U. S. 913 the government did not find the conflict between the very same cases in the Ninth, Sixth and Second Circuits which it now claims, but rather stated at page 9 of its brief in opposition:

> "There is no direct conflict. Since determination of the question depends upon the construction of the particular agreement in issue, the taxpayer's contention that the decision below is contrary to the decisions in *Deitsch* v. *Commissioner*, 249 F. 2d 534 (C. A. 6th), *Estate of Hirshon* v. *Commissioner*, (C. A. 2d), decided December 5, 1957 (58-1) U. S. T. C. par. 9116, modified on rehearing, January 3, 1958 (58-1 U. S. T. C. par. 9192), and *Weil* v. *Commissioner*, 240 F. 2d 584 (C. A. 2d), certiorari denied, 353 U. S. 958, *is plainly without merit.*" (emphasis added)

"Indeed, the court below expressly agreed with the Weil case in its application of the law to the facts, although it did not agree with the generality of some of its language.

* * * While there is language in the opinion of the Court of Appeals in the Weil case indicating its disapproval of prior Tax Court decisions, the opinion concludes by adopting the view in many of the decisions of that and other courts already cited, that the instrument 'must be read as a whole' and that 'No particular formula * * * is necessary.'

The Court below expressed disagreement with the Sixth Circuit's decision in *Deitsch* v. *Commissioner*, *supra;* however since both courts agree that this question is one of construction, and since both courts agree that the instrument must be read as a whole, this disagreement must be deemed to be factual in nature and to turn upon the Sixth Circuit's construction of the particular settlement agreement. The opinion in the *Deitsch* case fully supports this view. * * *"

It is respectfully submitted that this Court, by denying Certiorari in the *Weil* and *Eisinger* cases, *supra*, agreed that there was no real conflict between the Circuits.

In effect, the government is saying that when it wins a case there is no conflict between the Circuits, but merely a difference in the facts of each case. However, when it loses this difference in the facts becomes a serious conflict between the Circuits. In all justice this is not and cannot be so. If, as the government claimed, there was no conflict when the Eisinger case was decided, there is no conflict now. The Second Circuit in the opinion below does not reject the proposition that each agreement must be read to determine if it earmarks a portion of the payments as payable for support of the children. On the contrary, the Court stated that the language of the agreement, and in particular paragraph 11(j) (Pet. App. page 14) was interpreted by the Commissioner one way. The Court of Appeals then

proceeded to read the language of the agreement as not fixing an amount as payable for the support of the children.

All of the cases decided in the various Circuits hold that it is only the amount of the payment which continues to be payable to the wife after her remarriage which may be said to be allocated as payable for support of the children prior to her remarriage. *Eisinger* v. *Commissioner* 250 F. 2d 303 (C. A. 9) cert. den. 356 U. S. 913, *Metcalf* v. *Commissioner* 185 F. 2d 50 (C. A. 7), *Budd* v. *Commissioner* 177 F. 2d 198 (C. A. 6).

In the instant case, after the wife remarries, all payments cease regardless of the ages of the children, and therefore the entire payment is alimony. Thus, it is consistent with the above cited cases in the other Circuits, since all of the cases hold that the amount by which the payments are reduced upon the remarriage of the wife is alimony, and the amount which is paid for the children is allocated as child support. In the immediate case since all payments cease upon the remarriage of the wife the holding that all of the payments were for alimony is correct, and consistent with the decisions in the other Circuits.

The attention of the Court is respectfully directed to paragraph 11(d) of the agreement (R. 5a) which provides for maximum payment to the wife for years during which the children would be minors as well as emancipated. It is noteworthy that this maximum payment is not reduced even though the percentage payments are reduced when the children marry or become emancipated. This point again illustrates that each of these cases must be decided on its facts, and that the decision in this case is consistent with the decisions of the other Circuits.

It is therefore respectfully submitted that this Court should adhere to its prior position in denying certiorari. Since each case must be decided on its facts, the decisions of the Circuits are consistent and there is no real conflict between the Circuits.

2. The issue presented here is not likely to be of importance in the administration of the tax laws, and does not warrant review by this Court.

In opposing certiorari in *Weil* v. *Commissioner*, 240 F. 2d 584, cert. den. 353 U. S. 958, the government said in its brief at page 11:

> "The issue here presented is not likely to be a continuing one, since it arises only because the terms of the agreement here involved are ambiguous with respect to payments for support of minor children. * * *"

Certainly, with the advance of time, this statement is more true now than it was when made. With the many decisions on record, and the new legislation of the 1954 Code, counsel for separating spouses should have no trouble in adequately expressing their intentions so as to avoid this type of litigation in the future.

Since, as the government points out, the issue is not likely to be a continuing one and since it is also necessary to look at the specific facts of each case, it is difficult to conceive how a decision in this case would affect the cases the government claims are awaiting decision, because their fact situations are not necessarily the same as the case at bar. Therefore, this case does not warrant further review by the Court.

CONCLUSION

The decision below is not in direct conflict with the decision of another Court of Appeals: it turns upon the interpretation of a particular agreement; and it presents no problem of continuing importance in the administration of the tax laws. The petition should be denied.

Respectfully submitted,

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